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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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VIOLETA S. VILLANUEVA,
Plaintiff,
v.
WELLS FARGO BANK, N.A.,
Defendant.

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Case No. 18-cv-07094-KAW

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 26

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Plaintiff Violeta S. Villanueva filed the instant case against Defendant Wells Fargo Bank, N.A. (Dkt. No. 1.) Pending before the Court is Defendant's motion to dismiss Plaintiff's first amended complaint. (Def.'s Mot. to Dismiss, Dkt. No. 26.) Having considered the parties' filings, the relevant legal authority, and the arguments made at the April 4, 2019 hearing, the Court GRANTS Defendant's motion to dismiss.

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I. BACKGROUND

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On March 29, 2018, Plaintiff filed the instant case in state court, asserting a single cause of action for breach of contract. (Compl., Dkt. No. 1-1.) Plaintiff alleged that around 2011, she and Defendant entered into a "Home Affordable Modification Program Agreement (HAMP) to refinance the first mortgage on [her] property . . ." (Compl. ¶ BC-1 (all caps omitted).) Plaintiff further alleged that Defendant breached the agreement on March 29, 2014 when it "denied the application for invalid reasons." (Compl. ¶ BC-2 (all caps omitted).)

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Defendant was not served with the complaint until October 23, 2018. (Not. of Removal at 4-5, Dkt. No. 1.) On November 21, 2018, Defendant removed the case. (Not. of Removal at 1.) On November 28, 2018, Defendant filed a motion to dismiss. (Dkt. No. 7.) After Plaintiff failed to file her opposition, the Court issued an order to show cause why Defendant's motion should not

1 be granted as unopposed. (Dkt. No. 11 at 1.) Plaintiff did not file a response to the order to show
2 cause.

3 On January 10, 2019, the Court granted Defendant's motion to dismiss as unopposed.
4 (Dismissal Ord., Dkt. No. 13.) The Court also found "that on the merits, Plaintiff fails to allege
5 sufficient factual matter to state a facially plausible claim to relief in her complaint," including not
6 providing "any information about the terms of the contract at issue, what term Defendant allegedly
7 breached, and why Defendant's alleged breach was a violation of specific terms." (*Id.* at 2
8 (internal quotation omitted).) The Court gave Plaintiff "thirty days from the date of th[e] order to
9 file an amended complaint which addresses the deficiencies identified in th[e] order." (*Id.* at 3.)

10 On February 9, 2019, Plaintiff filed the operative complaint. (First Amended Compl.
11 ("FAC"), Dkt. No. 22.) Plaintiff alleges that Defendant's software contained calculation errors that
12 denied Home Affordable Modification Program ("HAMP") loan modifications to borrowers who
13 were otherwise qualified. (FAC ¶ 20.) Plaintiff alleges that Defendant miscalculated her loan
14 modification, which resulted in Defendant threatening foreclosure procedures. (FAC ¶ 12.)
15 Although Plaintiff "fought foreclosure for years," she ultimately sold her home in 2014 to avoid
16 foreclosure. (FAC ¶ 12.) Defendant later admitted in an SEC filing that it knew about the
17 software errors as early as October 2015. (FAC ¶ 23.) On September 21, 2016, Defendant sent
18 Plaintiff a letter stating that it "may not have properly reviewed your loan for the federal
19 government's Home Affordable Modification Program (HAMP)." (FAC ¶¶ 13, 18, Exh. C at 1.)
20 Defendant offered Plaintiff \$5,000 if Plaintiff signed a confidentiality and release agreement. (*Id.*)
21 The confidentiality and release agreement stated that the loan modification was denied in January
22 2013. (FAC, Exh. C at 2.) Based on these facts, Plaintiff brought claims for: (1) negligence, (2)
23 conversion, (3) violation of the Unfair Competition Law ("UCL"), and (4) negligence per se.
24 (FAC ¶¶ 27-56.) Plaintiff no longer pleads her breach of contract claim.

25 On February 22, 2019, Defendant filed the instant motion to dismiss and a request for
26 judicial notice. (Def.'s Mot. to Dismiss, Dkt. No. 26; Def.'s Request for Judicial Notice ("RJN"),
27 Dkt. No. 27.) On March 14, 2019, Plaintiff late-filed her opposition. (Plf.'s Opp'n, Dkt. No. 28.)
28 On March 25, 2019, Defendant filed its reply. (Def.'s Reply, Dkt. No. 32.)

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II. LEGAL STANDARD

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A. Request for Judicial Notice

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A district court may take judicial notice of facts not subject to reasonable dispute that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). A court may, therefore, take judicial notice of matters of public record. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

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B. Motion to Dismiss

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Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based on the failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

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In considering such a motion, a court must "accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted), and may dismiss the case or a claim "only where there is no cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro*, 250 F.3d at 732) (internal quotation marks omitted).

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A claim is plausible on its face when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

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"Threadbare recitals of the elements of a cause of action" and "conclusory statements" are inadequate. *Iqbal*, 556 U.S. at 678; *see also Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility standard is not akin to a

1 probability requirement, but it asks for more than a sheer possibility that a defendant has acted
2 unlawfully . . . When a complaint pleads facts that are merely consistent with a defendant's
3 liability, it stops short of the line between possibility and plausibility of entitlement to relief."
4 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted).

5 If the court grants a motion to dismiss, it should grant leave to amend even if no request to
6 amend is made "unless it determines that the pleading could not possibly be cured by the
7 allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations omitted).

8 III. DISCUSSION

9 A. Request for Judicial Notice

10 Defendant requests that the Court take judicial notice of: (A) the June 12, 2007 deed of
11 trust, (B) the October 7, 2014 grant deed, (C) the November 19, 2007 letter from the Office of
12 Thrift Supervision, and (D) the Official Certification of the Comptroller of the Currency regarding
13 the conversion of Wachovia Mortgage, FSB to Wells Fargo Bank Southwest, N.A. (Def.'s RJD at
14 2.) Plaintiff did not oppose.

15 The Court takes judicial notice of the deed of trust and grant deed because they are true
16 and correct copies of official public records, whose authenticity is capable of accurate and ready
17 determination by resort to sources whose accuracy cannot reasonably be questioned. The Court
18 also takes judicial notice of the Office of Thrift Supervision letter and the Comptroller of the
19 Currency certification, as both are government records not subject to reasonable dispute. Courts in
20 this district have taken judicial notice of both documents. *See DeLeon v. Wells Fargo Bank, N.A.*,
21 Case No. 10-cv-1390-LHK, 2011 WL 311376, at *2-3 (N.D. Cal. Jan. 28, 2011).

22 B. Motion to Dismiss

23 Defendant argues that dismissal is warranted because: (1) Plaintiff exceeded the scope of
24 the Court's order giving leave to amend by adding new claims, (2) Plaintiff's claims are time-
25 barred, and (3) Plaintiff fails to adequately plead her claims. (Def.'s Mot. to Dismiss at 1.) The
26 Court agrees that Plaintiff's claims are time-barred.

27 As an initial matter, dismissal is warranted because Plaintiff was not given leave to add
28 new claims. "California district courts have occasionally considered new claims submitted in an

1 amended complaint where the prior order of dismissal granted leave to amend without limitation."
2 *DeLeon v. Wells Fargo Bank, N.A.*, Case No. 10-cv-1390-LHK, 2010 WL 4285006, at *3 (N.D.
3 Cal. Oct. 22, 2010). Where, however, "leave to amend is given to cure deficiencies in certain
4 specified claims, courts have agreed that new claims alleged for the first time in the amended
5 pleadings should be dismissed or stricken." *Id.* In the instant case, the Court gave Plaintiff leave
6 to amend to "address[] the deficiencies identified in this order." (Dismissal Ord. at 3.) It did not
7 give Plaintiff leave to amend without limitation, and thus Plaintiff's addition of new claims is
8 improper. *Compare with DeLeon*, 2010 WL 4285006, at *3 ("the prior order granting leave to
9 amend was limited in scope, and Plaintiffs were therefore required to seek leave of the Court
10 before adding new claims."); *Cover v. Windsor Surry Co.*, Case No. 14-cv-5262-WHO, 2016 WL
11 3421361, at *3 (N.D. Cal. June 22, 2016) (dismissing newly added claim because the "claim
12 exceeds the scope of allowable amendment under [the] previous order").

13 Even if the added claims were proper, the Court finds that dismissal is still warranted
14 because the claims fall outside of the statute of limitations. The parties do not dispute that the
15 statute of limitations for negligence and negligence per se claims is two years, while the statute of
16 limitations for UCL claims is four years.¹ (Def.'s Mot. to Dismiss at 3; Plf.'s Opp'n at 11.) Rather,
17 the parties dispute whether equitable tolling and the delayed discovery rule apply.

18 "Equitable tolling is generally applied in situations where the claimant has actively pursued
19 his judicial remedies by filing a defective pleading during the statutory period, or where the
20 complainant has been induced or tricked by his adversary's misconduct into allowing the filing
21 deadline to pass." *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2006). "If a
22 reasonable plaintiff would not have known of the existence of a possible claim within the
23 limitations period, then equitable tolling will serve to extend the statute of limitations for filing
24 suit until the plaintiff can gather what information he needs." *Lukovsky v. City & Cty. of S.F.*, 535
25 F.3d 1044, 1052 (9th Cir. 2008). "Similarly, 'the discovery rule only delays accrual until the
26 plaintiff has, or should have, inquiry notice of the cause of action.' 'A plaintiff has reason to
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28¹ Plaintiff concedes she cannot bring a conversion claim. (Plf.'s Opp'n at 16.)

1 discover a cause of action when he or she has reason at least to suspect a factual basis for its
2 elements.'" *McFarland v. JP Morgan Chase Bank*, No. EDCV 13-1838-JGB (OPx), 2014 WL
3 4119399, at *9 (C.D. Cal. Aug. 21, 2014) (quoting *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th
4 797, 807 (2005)). The discovery rule likewise concerns whether a reasonable person was put on
5 inquiry notice; "[a] plaintiff is held to her actual knowledge as well as knowledge that could
6 reasonably be discovered through investigation of sources open to her." *Jolly v. Eli Lilly & Co.*,
7 44 Cal. 3d 1103, 1109 (1988).

8 Plaintiff argues that "she was not aware of her claims until she received the September 21,
9 2016 letter from [Defendant] acknowledging that they may have failed to properly process her
10 loan modification." (Plf.'s Opp'n at 13.) The Court disagrees. While Defendant may not have
11 informed Plaintiff of its potential error until September 2016, Plaintiff knew the *factual* basis for
12 her claims as of the January 2013 denial, sufficient to put her on inquiry notice. In *Burrington v.*
13 *Ocwen Loan Servicing, LLC*, the Ninth Circuit upheld the dismissal with prejudice of the
14 plaintiff's Montana Consumer Protection Act claim based on the statute of limitations. 736 Fed.
15 Appx. 649, 651 (9th Cir. 2018). The Ninth Circuit explained that the plaintiff had been told he
16 was not considered for a HAMP loan modification as of December 22, 2010, which meant he had
17 been "provided . . . with the information needed for his claim, regardless of whether [the plaintiff]
18 actually believed the statements or understood the reasons for the denial." *Id.*

19 Such is the case here. As in *Burrington*, Plaintiff knew her loan modification request was
20 denied as of January 2013. (FAC, Exh. C. at 2.) Moreover, the HAMP guidelines were publicly
21 available, such that Plaintiff had access to information as to whether her application was
22 improperly denied. Indeed, Plaintiff alleges in her complaint that she continued to fight the
23 foreclosure proceedings even after the denial, implying that Plaintiff did in fact suspect the denial
24 was in error. (See FAC ¶ 12.) Thus, the statute of limitations would have expired in January 2015
25 for the negligence claims and January 2017 for the UCL claim, requiring dismissal with prejudice.

26 At the hearing, Plaintiff argued, without authority, that the September 2016 letter served as
27 a "second" inquiry notice that restarted the statute of limitations. There is no legal basis for this
28 proposition. Even if Plaintiff received additional inquiry notice via the September 2016 letter, this

1 does not change the wrongful conduct that occurred when Defendant allegedly incorrectly denied
2 the loan modification application. It is this wrongful conduct that Plaintiff had inquiry notice of as
3 of January 2013. The September 2016 letter does not create a new statute of limitations based on
4 this same conduct.

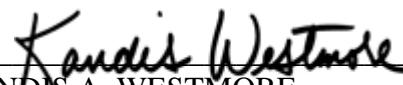
5 Accordingly, the Court finds that Plaintiff fails to allege adequate facts that would support
6 tolling of the statute of limitations. Because the Court finds that Plaintiff's complaint must be
7 dismissed with prejudice based on the expiration of the statute of limitations, the Court need not
8 consider Plaintiff's claims on the merits.

9 **IV. CONCLUSION**

10 For the reasons stated above, the Court GRANTS Defendant's motion to dismiss with
11 prejudice.

12 **IT IS SO ORDERED.**

13 Dated: April 5, 2019

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15 KANDIS A. WESTMORE
16 United States Magistrate Judge